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CPLR 5240: Court Gives Judgment Debtor Credit Equal to the Difference Between the Fair Market Value and the Sale Price of Real Property Purchased by the Judgment Creditor at an Execution Sale

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CPLR 5240: Court gives judgment debtor credit equal to the difference between the fair market value and the sale price of real property purchased by the judgment creditor at an execution sale.

Manipulation of lawful enforcement procedures has been the subject of strong criticism from within the judicial system as well as from without.[144] *Wandschneider v. Bekeny*[145] presents a classic example of such abuse. A judgment in the amount of $97,811.30 had been obtained in the Southern District of New York for securities violations. After docketing the judgment in Westchester County, the judgment creditors levied on the debtors' home in New Rochelle which, by the creditors' own appraisal, had a market value exceeding $55,000. The home was sold for a trifling $500 at an execution sale at which the plaintiff's counsel was the only bidder. After losing their home together with a $27,000 equity therein, the debtors were left with unpaid mortgage notes and the vast bulk of the judgment yet to be satisfied.

The judgment debtors brought an unsuccessful special proceeding to set aside the sale on the ground that the selling procedure had been defective. On motion for reargument,[146] they contended that the inadequacy of the bid price provided a basis for relief under CPLR 5240,[147] in the form of either rescission of the sale or an offset against the judgment in the amount of the fair market value of the property. The motion was granted, the court choosing the latter alternative. In granting this novel form of relief, the court carefully limited itself to the specific facts of the case before it.

> [T]he court holds that where, as here, the purchaser of the property at the Sheriff's Sale is the holder of the judgment being executed upon, the judgment debtors are entitled to a credit against the judgment for the difference between the sale price and the fair market value of the premises . . . .[148]

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144 *See* Lee v. Community Capital Corp., 67 Misc. 2d 699, 324 N.Y.S.2d 583 (Sup. Ct. Nassau County 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 578 (1972); M. T. BLOOM, THE TROUBLE WITH LAWYERS 84-98 (1969); 7B MCKINNEY'S CPLR 5236, supp. commentary at 154 (1969).

145 169 N.Y.L.J. 121, June 22, 1973, at 17, col. 7 (Sup. Ct. Westchester County).

146 The court labeled this application a motion for rehearing on additional facts.

147 CPLR 5240 reads in pertinent part:

> The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure . . . .

This section is analogous to CPLR 3103, which provides for protective orders for abuse of disclosure procedures. *See* 7B MCKINNEY'S CPLR 5240, commentary at 203 (1963).

148 169 N.Y.L.J. 121, at 18, col. 1. The court cited as authority Clarke v. Schumann, 269 N.Y. 60, 198 N.E. 666 (1935), which held that pursuant to CPA 1083(a) the court must ascertain the market value of property received by a mortgagee as purchaser and must

CPLR 5240 is intended to relieve the judgment debtor from the harsh consequences which may result from the lawful use of enforcement procedures. Despite its potential,[149] it has been invoked infrequently and generally in cases involving an execution on the husband's half of a tenancy by the entirety.[150] The *Wandschneider* court noted that the application of CPLR 5240 to a lawfully consummated sheriff's sale was unprecedented, but relied on the broad discretion given the court by that section to avoid unconscionable results. Additionally, the court considered such relief to be within its equitable jurisdiction. Although the *Wandschneider* remedy is new, relief in the post-sale stage is not wholly unprecedented. In *Lee v. Community Capital Corp.*,[151] the petitioner sought to have an execution sale vacated pursuant to the authority granted in CPLR 5240. In setting it aside, the court chose instead to rely on Judiciary Law section 489.[152] A sheriff's sale was similarly set aside in *Holness v. McGillan*,[153] the court relying on its general equity powers.

Despite its claim of a narrow holding, the *Wandschneider* decision may have an impact on the handling of unconscionable but tech-

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enter a deficiency judgment for the difference between such value and mortgagor's indebtedness. Today RPAPL 1371(2) would mandate the same result in cases of mortgage foreclosure.

149 Professor David D. Siegel has noted that:

> The problem has not been that CPLR 5240 does not supply such a power [to set aside a sale]. It just seems to be a matter either of the lawyers not pressing for that section's application or the judges not taking it as the broad source of authority it was intended to be.

7B McKINNEY'S CPLR 5236, supp. commentary at 156 (1969).

150 Seyfarth v. Bi-County Elec. Corp., 73 Misc. 2d 363, 341 N.Y.S.2d 533 (Sup. Ct. Nassau County 1973) (mem.); Hammond v. Econo-Car of the North Shore, Inc., 71 Misc. 2d 546, 336 N.Y.S.2d 493 (Sup. Ct. Nassau County 1972) (mem.), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 580, 603 (1973); Gilchrist v. Commercial Credit Corp., 66 Misc. 2d 791, 322 N.Y.S.2d 200 (Sup. Ct. Nassau County 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 378 (1971). In each case the court issued an order vacating and setting aside the proceedings to conduct the execution sale.

Other decisions relying upon CPLR 5240 are equally unimpressive. *See* Cook v. H.R.H. Construction Corp., 32 App. Div. 2d 806, 302 N.Y.S.2d 364 (2d Dep't 1969) (mem.), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 574 (1970) (unsuccessful attempt by one judgment creditor to set aside an execution by another judgment creditor); Olsen v. Robaey, 45 Misc. 2d 33, 256 N.Y.S.2d 103 (Sup. Ct. Suffolk County 1965) (time requirements relaxed for service, posting and advertising of a notice of postponement of an execution sale where both parties consented); Kaplan v. Supak & Sons Mfg. Co., 46 Misc. 2d 574, 260 N.Y.S.2d 374 (N.Y.C. Civ. Ct. N.Y. County 1965) (unsuccessful attempt by judgment creditors to invoke the statute to circumvent the notice requirement for an income execution).

151 67 Misc. 2d 699, 324 N.Y.S.2d 583 (Sup. Ct. Nassau County 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 578 (1972).

152 This statute prohibits the assignment of claims to professional collectors for the purpose of bringing actions thereon.

153 161 N.Y.L.J. 6, Jan. 9, 1969, at 19, col. 6 (Sup. Ct. Westchester County).

nically legal execution sales. It serves notice that the courts will not sit by and permit a judgment creditor to obtain an undeserved windfall at the debtor's expense. The *Wandschneider* remedy will be of greatest assistance to the low income consumer who is the worst victim of abuses of the collection process and is the least likely to take advantage of his legal rights.[154] This decision may give him a later stage at which to intervene. The *Wandschneider* procedure has the additional advantage of giving the judgment creditor an equitable means of enforcing his judgment while protecting the debtor from inequities.

ARTICLE 75 — ARBITRATION

CPLR 7503(c): Legislature lengthens the period within which a party may apply for a stay of arbitration.

Pursuant to the Judicial Conference's recommendation,[155] the Legislature has made several changes in CPLR 7503(c) which will ameliorate some of its harshness.[156] Most importantly, it has extended from ten to twenty days the time within which a party is allowed to move to stay arbitration after receipt of a demand for arbitration or a notice of intention to arbitrate. This time frame remains short enough to permit expeditious settlement of commercial disputes while allowing a more reasonable time to respond.[157] Two other changes codify case law constructions of the subdivision.[158] The first authorizes service of a notice of application to stay arbitration on the adverse party's attorney provided that the attorney's name appeared on the notice of intention to arbitrate or the demand for arbitration. The second expressly provides that service of the notice is timely if mailed within the twenty-day period. On its own initiative, the Legislature added a clause making null and void any provision in an arbitration agreement purporting to waive the right to apply for a stay. Lastly, the subdivision was changed to specifically encompass a "demand for arbitration" as well as a "notice of intention to arbitrate."

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154 *See* 7B MCKINNEY'S CPLR 5236, supp. commentary at 153 (1965).

155 JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, REPORT TO THE 1973 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES AND PROPOSED AMENDMENTS ADOPTED PURSUANT TO SECTION 229 OF THE JUDICIARY LAW 59-63 (1973) [hereinafter JUDICIAL CONFERENCE REPORT].

156 L. 1973, ch. 1028, at 1883, eff. Sept. 1, 1973.

157 *See* JUDICIAL CONFERENCE REPORT 61.

158 *Id.* at 62, *citing* Matter of Knickerbocker Ins. Co., 28 N.Y.2d 57, 268 N.E.2d 758, 320 N.Y.S.2d 12 (1971), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 531 (1971).